FILE COPY

APR 8 1948

In the

Supreme Court of the United States

OCTOBER TERM, 1948

No. 644

RUAN TRANSPORT CORPORATION,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Respondent.

WILLIAM D. HAWLEY,
Petitioner,

vs.

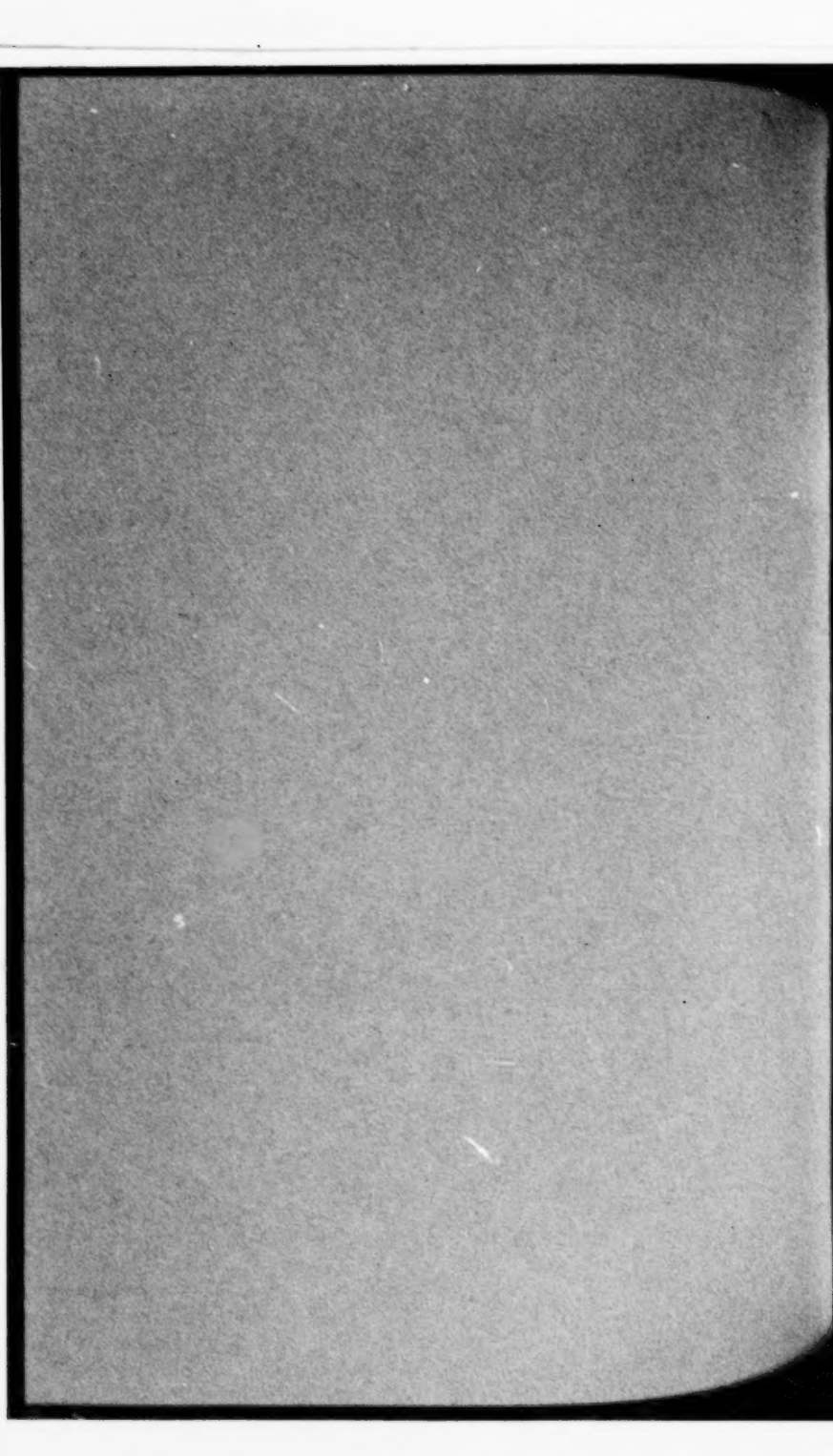
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JOHN HALE,
J. C. PRYOR,
408-416 Tama Building,
Burlington, Iowa,
Attorneys for Respondent.

ELDON MARTIN,
547 West Jackson Blvd.,
Chicago 6, Illinois,
Of Counsel.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA



INDEX

LIST OF AUTHORITIES

LIST OF AUTHORITIES—Continued

LIST OF AUTHORITIES—Continued

STATUTES CITED

In the
Supreme Court of the United States

—o—

OCTOBER TERM, 1948

No.....

—o—

RUAN TRANSPORT CORPORATION,
Petitioner,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent.

WILLIAM D. HAWLEY,

Petitioner.

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Respondent.

—o—

RESPONDENT'S BRIEF IN OPPOSITION

—o—

I.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported in 171 Fed. (2d) 781.

—o—

II.

JURISDICTIONAL STATEMENT

The jurisdiction of the Federal Courts in this litigation is based solely upon diversity of citizenship of

the parties. Ruan Transport Corporation, an Iowa corporation, commenced its action in the state court and it was removed upon petition of defendant railroad company, an Illinois corporation. Hawley, an Iowa citizen, commenced his action in the United States District Court for the Southern District of Iowa. The actions were consolidated for trial and determination.

Petitioners ask for the issuance of the discretionary writ of certiorari to review the decision of the Court of Appeals of the Eighth Circuit, reversing judgments for the plaintiffs. That decision is reported in 171 Fed. (2d) 781.

In general it may be said that the writ should issue only where uniformity of decision between the courts of appeal is the goal sought (*Magnum Import Co. v. Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. ed. 922), or where the question is of general importance and it is in the public interest to have it decided by the court of last resort. And as to questions controlled by state law, conflict among the Federal Courts of Appeals is not of itself a reason for granting the writ. *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.

It is true that as stated in the last case cited, the writ may be granted "where a circuit court of appeals has decided an important question of local law in a way probably in conflict with applicable local decisions." But we propose to show that as to the common law of Iowa on contributory negligence, the Court of Appeals decision presents no conflict; and that as to its interpretation of the statute involved, there could be no

conflict, since it is conceded that in that respect there was and is no "local decision."

We will direct attention first to the latter proposition. When the statute in question (Sec. 321.343 Iowa Code, 1946) was cited in Respondent's motion for directed verdict, the trial Judge said, "I never heard of it." (R. 71); yet this law had been a part of the Iowa Code since 1937 (Chapter 134, Sec. 368, Acts 47th G. A.). There has never been any Iowa court interpretation of the statute, however. As to the effect of the rule of the Erie case in such a situation, Judge John J. Parker has said recently that the Erie rule "does not require that federal courts follow state decisions which state courts are not bound to follow, nor that they abdicate their judgment and enter into the field of speculation as to what state courts might do in cases they have not decided." 35 Am. Bar Assn. Journal 21.

In the case of *New England Mutual Life Ins. Co. v. Mitchell,* 118 Fed. (2d) 414, 420 the same distinguished jurist, in his opinion said:

> "Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to consider that question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn

duty in the premises and embark upon a vain and illusory enterprise."

———o———

III.

STATEMENT

The adroitness of Petitioners' statement of facts, through the medium of certain important omissions, understatement in respect to some facts, and overemphasis as to others, produces a result which is misleading and unfair.

Nowhere is there any mention of the fact that all of the tracks crossing 28th Street, where the unfortunate accident here involved occurred, were owned and controlled, not by Respondent, but by the Davenport, Rock Island and Northwestern Railway Company (R. 106); that the only rights Respondent had were running rights on track No. 2, which it enjoyed together with certain other railroads; that, except for track No. 2,—the operating track,—these tracks were used for storage and switching; that this track No. 2 was the one on which the train involved in the accident had to travel; these latter facts being known at all times by Hawley, the driver of the Ruan truck (R. 25).

Petitioner says that "*as he passed the north side of the line of cars on track 3,* he saw the oncoming train for the first time." (Emphasis supplied.) What does the record show? Hawley testified:

> "When I first saw the train the front bumper of my tractor was across both rails of the main line track, or number 2 track. The front axle, the front

drivers of the tandem tractor, was sitting on the southernmost rail I figured of Number 2 track when I first saw the train. * * * I was only going 2 miles per hour. I put on the brakes, then went into reverse. She moved back, I couldn't say how far." (R. 26)

The record shows that this tractor had tandem or dual drivers, four drivers on each side. The front drivers which were "sitting on the southernmost rail of Number 2 track" were 178 inches back from the front bumper. Hawley was seated 106 inches back of the front bumper or 6 feet in front of the front drivers. These figures are computed from Petitioners' Exhibit No. 1 (R. 44). They show that when Hawley first saw the train, according to his own testimony, he was seated several inches north of the north rail, for it is undisputed that the track was of standard gauge, 4 feet 8½ inches between rails (Exhibit A, R. 18). Hawley testified that the distance from the front bumper to where he was sitting was 7½ or 8 feet (R. 24). If this figure is used instead of the exact figures of Petitioners' Exhibit No. 1, he must have been even further to the north of the north rail when he first saw the train. Even if the cars on track No. 3 had been right up to the edge of the highway instead of 75 to 80 feet down track No. 3 to the east, and even if Hawley had been driving on the east side of the road instead of "way over on the left-hand side as far as possible" (R. 26), he would have passed beyond the line of overhang of the cars on track No. 3 at a point approximately 8 feet south of the south rail of the running track (track No. 2). If the reverse operation to which he testified had taken place then or soon thereafter, any such reverse movement at all

would have put Hawley clear of danger. However, it is not necessary to resort to such hypothesis, as, under the facts of record, the distance of the cars on track No. 3 from the crossing is pretty well established as between 75 and 80 feet (R. 25) and his view from the west side of the road must have enabled him to have a much earlier view.

The following facts should be kept in mind:

1. Physical facts. 28th Street runs north and south on the outskirts of Bettendorf, which one witness said had a population of "roughly" 7,000 (Population, 1940 census, 3,143). The railroad station was a mile distant. The five tracks crossing this street east and west were owned by the Davenport, Rock Island and Northwestern Railway Company, not the Respondent, and there is no record that the latter had other than running rights, these rights being limited to No. 2 track, where the accident occurred (R. 120).

Petitioner's Exhibit G (R. 36) shows a sign at the south end of this crossing, reading "trainmen must not block this crossing 400 ft. away," a sign presumably posted by the owner of the tracks for the direction of its employees. The photograph, Exhibit 7 (R. 87), shows the spot at the south end of the crossing where Hawley stopped, not primarily to look or listen and not at all to comply with the Iowa statute, but to give anoher motorist, Crites, room to make the turn and also so that Hawley himself could obtain a pinch of snuff from the package in the pocket of his coat lying on the seat beside him (R. 25 and 48). If he did look, the picture shows that at that point looking for the train which

he knew was due was a futile act. As he moved northerly over the tracks for the next 40 or 50 feet, however, the train, which Crites had seen (R. 48), was drawing nearer, and the sounds of its approach necessarily increasing in volume. Moreover, the relative heights of the locomotive (15 ft. 2 in.) on the main track, No. 2, and the freight cars (11 ft. 11 in.) on the siding, not to mention the smoke from the engine, gave to the highway traveler visual knowledge of the train's approach even before he emerged from the freight cars' line of overhang,—that is if the traveler looked. This highway was used almost exclusively by gasoline trucks, the estimated total traffic being 150 round trips per day; not what could be called heavy traffic. The terrain was level and the running or main track was straight for a mile east of the crossing.

2. Hawley's conduct. As stated by Petitioner, Hawley was thoroughly familiar with the crossing (R. 20 and R. 26, 27), knew of this train, that it was past due, that "it had not gone by yet to the best of my (his) knowledge" (R. 26), and he knew on which track this passenger train would travel. He also knew, as stated by his counsel, of the dangerous character of his cargo, 6300 gallons of gasoline. With this knowledge, the only stop he made was at a point 40 to 50 ft. from the track on which he knew this train would travel, and at a point where he knew his view was obstructed. The reasons for this stop have been stated. Then, with his vision utterly obstructed, a fact of which he was at all times aware (R. 26), and utterly ignoring both the duty of a prudent man and the statutes' mandate, that he not proceed until he could "do so safely," he drove the dis-

tance to the main track and then onto that track without again stopping. He does say that he kept looking, but the physical facts show that if he did, he must have seen the train before he admits he did, when the front bumper of his tractor "was over the north rail of the track the train was on" and his drive wheels were "in line with the south rail of that track." (R. 26)

3. The operation of the train. It is common knowledge that a train traveling at 40 m. p. h. makes considerable noise. Moreover, except for the testimony of a few witnesses who "did not hear" them, there is no question that the customary warning signals were given. Within the mile east of the crossing, the engineer whistled three times and gave the regulation blasts for this crossing (R. 82). His positive testimony is corroborated by several disinterested witnesses who were in a position to hear. The bell was automatic and rang continuously (R. 82-84). There was no valid city ordinance regulating the speed of trains.

The Court of Appeals did not reverse the judgments for the Ruan Transport Corporation and Hawley solely upon the basis of the statute (Sec. 321.343, Code of Iowa, 1946) although it found in that violation a circumstance sufficiently contributing to the occurrence of the accident to bar recovery. Neither did it reverse the judgments because the truck driver failed to look or listen at a particular place. It found ample ground for reversal upon the undisputed physical facts which showed clearly that if Hawley had actually exercised these precautions at any time when and place where such precautions were not to his knowledge futile, he could have

seen and heard the train in time to have avoided the accident.

IV.

QUESTION PRESENTED

The sole question presented is whether or not the Court of Appeals for the Eighth Circuit was in error in reversing judgment for petitioner in each of the consolidated cases and directing a dismissal on the ground of contributory negligence.

V.

REASONS RELIED ON FOR DENIAL OF THE WRIT

1. The interpretation of the Court of Appeals based upon Section 323.343, 1946 Code of Iowa, is not in conflict with the local law of the State of Iowa for the reason that the Supreme Court of Iowa, being the only appellate court in that state, has never had occasion to interpret the statute and there is nothing in the Iowa reports to indicate what its position will be.

2. The Court of Appeals very properly held that the violation of the statute was a contributing cause of the injury and constituted contributory negligence barring recovery in each case.

3. The Court of Appeals very properly followed the law of the State of Iowa with reference to the rights and duties of motorists approaching railroad crossings where the view is obscured as determined in the case of

Dean v. C. B. & Q. R. R. Co., 211 Iowa 1347, 229 N. W. 223.

4. Petitioners have been deprived of no constitutional rights whatever because (a) there is no constitutional question in this case, (b) the seventh amendment to the constitution of the United States has no application to these cases, (c) no constitutional question was raised either at the trial or before the Court of Appeals either at the time of submission or at the time of petition for rehearing.

5. The Court of Appeals has been guilty of no misconduct whatever. It has merely decided these cases adversely to the petitioners.

———o———

VI.

ARGUMENT IN OPPOSITION TO PETITION

A. The Court of Appeals committed no error in its construction of Section 321.343, Code of Iowa, 1946.

Petitioners' diatribe against the able and conscientious judges of the court below requires no reply. Suffice it to say that such scurrility is neither justified by the record nor by the opinion.

Petitioners apparently wish this court to believe that Hawley is in the Federal Court "against his will" (Pet. Arg. p. 11), although the record shows that the Ruan case only was commenced in the state court, the Hawley case having been initiated in the Federal Court. Hawley at least cannot complain of any imaginary loss of rights, privileges or advantages claimed by him to have been

prevailing in the state court, when he himself chose the forum.

In a totally immaterial discussion of the alleged importance of this case to Hawley, petitioners state on page 11 of their argument that "the railroad concedes its fault." This statement the respondent denies without qualification. No such concession was made or suggested at any time, including the present, and its existence lies solely within the overactive imagination of counsel for the petitioners.

We have no particular quarrel with petitioners' discussion of the facts except for a potentially misleading statement on page 14 of their argument, where it is said that when Hawley stopped short of the tracks he looked and listened for trains but saw or heard none. In this connection it must be remembered that at that point Hawley's view was obstructed. Defendant's Exhibits 7 and 8 (R. 87, R. 89) were taken immediately after the accident from a point almost identical with that at which Hawley was sitting when he claims to have stopped and looked. By his own testimony he was 7½ or 8 feet back of the bumper (R. 24), and the bumper was 8 feet south of the nearest rail (R. 24, 25), which would locate Hawley about 15½ to 16 feet south of the south rail. Defendant's Exhibits 7 and 8 were taken 20 feet south of the south rail at about the center of the extension of 28th Street (R. 85). These two photographs in and of themselves constitute a more persuasive argument than any which we could write. They show beyond doubt that Hawley's view at that point was totally obscured except for the vertical projection of the locomotive above the cars.

In connection with the obstructions to the view we must never lose sight of the fact that the respondent had no control whatever of the placing of the cars (R. 106), nor had it any rights or duties with respect to the condition of the crossing, its sole rights being operating rights, on track No. 2.

Another possibly misleading statement appears in the last paragraph on page 15 of petitioners' argument, continuing on page 16. Petitioners there state, "When his line of vision passed the north side of Car 67009 on Track 3, Hawley had for the very first time an unobstructed view of more than 75 feet of Track 2." That much of the statement is undeniably correct. But the petitioners continue "and saw the train coming down the track" etc. That part of the statement is in direct conflict with the record, *because it was not at that point that he looked.* What does Hawley himself say? "When I first saw the train the front bumper was across both rails of the main line." (R. 26.) (It is to be observed in passing that he does not state *how far* his bumper was north of the north rail of Track 2.) Hawley continues: "The front axle, *the front drivers of the tandem tractor,* was sitting on the southernmost rail, I figured, of Number 2 track *when I first saw the train.*" (Italics ours.)

How far, then, was the bumper north of the north rail? Defendant's Exhibit 1 (R. 45) discloses that the distance from the front bumper to the center of the front wheel is 39⅝ inches. From the center of the front wheel to a point midway between the drive wheels or "drivers" is 161 inches or a total of 200⅝ inches. From this distance should be deducted the distance from the

midway point to the center of the front driver, which is shown as 23 7/16 inches. This leaves a net distance from the bumper to the center of the front driver of 176⅞ inches or approximately 14 feet 9 inches.

The distance between the rails is shown to be 4 feet 8½ inches (Plaintiffs' Exhibit A, R. 19). If, as Hawley says (and no one disputes him as to this) the center of the front driver was on the south rail, the bumper would obviously be just a little over 10 feet north of the north rail when Hawley saw the train for the first time.

Under these facts, it is small wonder that the Court of Appeals held that Hawley was guilty of negligence contributing to the accident, particularly in view of the terms of the Iowa statute requiring that the driver of a gasoline truck at a railway crossing shall stop and "shall not proceed until he can do so safely."

In passing, we cannot refrain from commenting on petitioners' statement in argument (p. 16) that "This will *permanently* prevent him from making a living by driving a truck." (Italics ours.) What is the basis in the record for this statement? The only possible basis in the record is found merely in Hawley's own statement (R. 23): "I cannot drive a truck." This obviously refers to the time of the trial and not to the future. On the other hand, what does Hawley's own doctor say? His prognosis appears at the bottom of R. 59: "This man is disabled and he is not completely disabled. *In other words, he is not unable to return to all of his work.*" (Italics ours.)

Reverting now to the interpretation which the Court of Appeals placed upon the Iowa statute, petitioners argue loudly and at length that that Court read into the statute something that was not previously there, to wit: that the driver of a gasoline transport is required by the statute to stop and to look and to listen at a point where looking and listening will be effective, so that he can know when it is safe to proceed.

This position of petitioners' counsel is wholly unfair to the Court of Appeals and demonstrates clearly that counsel have not read the opinion with care. The Court's view is clearly expressed in one of the very quotations of which counsel complains (Petitioners' argument, p. 18). The court says: "*In the light of the Iowa cases concerning the relative rights of motorist and railroad at railroad crossings,* this statute must be read to mean that the driver of one of the vehicles described shall stop within the distances specified where by looking he can see and by listening he can hear." (Italics ours.)

The propriety of interpreting statutes by comparison with the common law has been recognized as long as statutes have been interpreted by the courts. What the opinion holds in effect is that:

1. The driver of a gasoline transport is required *by the statute* to stop within specified distances before attempting to cross any railroad.

2. The driver is required *by the common law of Iowa* as determined in the *Dean* case and others to look and listen where looking will be effective.

3. The driver is required *by the statute* not to attempt to cross until he can do so safely.

4. Therefore, by a combination of the statute and the common law, such a driver is required to stop within the specified distances, to look and listen at points where it is possible to see and hear, and not to proceed until he can cross in safety.

Petitioners' counsel admit that the Iowa court has never construed this statute, and in the same breath they contend that the Court of Appeals is required to conjecture, from stray language in Iowa opinions, just how the Iowa Supreme Court might interpret it. Chief Judge John J. Parker of the Fourth Circuit in the January 1949 American Bar Association Journal (Vol. 35, p. 19 et seq.) answered that contention very thoroughly. Judge Parker says at page 21:

> "The decision goes no further than to require that federal courts in the exercise of their diversity jurisdiction follow binding state court decisions, under the doctrine of *stare decisis,* just as state courts must follow them. It does not require that federal courts follow state decisions which state courts are not bound to follow, *nor that they abdicate their judgment and enter into the field of speculation as to what state courts might do in cases which they have not decided,* nor that they follow state courts in matters of procedure or matters involving the exercise of the judicial function. What it does, and all that it does, is that, in diversity cases, it extends to the general field of decision the rules theretofore applicable to decisions interpreting state statutes or matters of local law. The matter was well put by Mr. Justice Reed in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 209, where he said;

> "'The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of "general" law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the court, and just as they have always done in actions brought in the federal courts involving what were known as matters of "local" law.'"

Further on in his article he says (p. 83):

> "The most vehement invoking of the rule generally occurs in cases to which it is not applicable at all, in cases where there are no state decisions directly in point on the question involved but tortuous reasoning from dicta or cases not in point is relied upon to support propositions that the courts of the state have never decided and no court in any state is ever likely to decide. So often is this true that the mere citation of *Erie v. Tompkins* is generally enough to raise a question as to the soundness of the proposition which is advanced—advanced as a peculiar proposition of state law which the federal courts are asked to enforce notwithstanding that reason and the current of authority are to the contrary."

In the same article Judge Parker quotes from his own opinion in *New England Mutual Life Ins. Co. v. Mitchell*, 118 Fed. (2d) 414, 420, in part as follows:

> "We are not required, however, to speculate as to how the state court might decide the question before us if it has not already decided it. Nor should we surrender our own judgment as to what the local law is on account of dicta or other chance expressions of the judges of the local courts. The respectful attitude towards the local court, where there has been no decision on the precise question before us, is to

consider that question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta, or upon speculation as to what the local court might decide in the light of dicta, would be to depart from our solemn duty in the premises and embark upon a vain and illusory enterprise."

The Iowa cases cited in Division I of petitioners' argument do nothing more than to confirm the proposition that under the common law of Iowa a driver approaching a railway crossing must look where he can see and listen where he can hear. As we have pointed out, the statute imposes additional requirements upon the driver of a gasoline truck.

With respect to the cases cited by petitioner from jurisdictions other than Iowa it must be remembered that no case is stronger than the facts upon which it is based. For similar reasons authorities from a foreign state are of little value unless both the substantive and the adjective law of the foreign state are substantially the same as the law of the forum. In the case of *Dommer v. Pa. R. Co.*, 156 Fed. (2d) 716, relied upon by petitioners, both the facts and the law were different from those of the case at bar. There the driver stopped until a freight train went by and was struck by a passenger train going in the opposite direction. The statute is set out in a footnote to the opinion and differs in many respects from the Iowa statute. The lower court directed a verdict for the defendant, and a reversal ensued. But the reversal did not constitute a finding that plaintiff was not negligent. The court simply recognized the Indiana rule (which is directly in conflict with the Iowa rule)

that in practically no case can a plaintiff be held guilty of negligence *as a matter of law,* it being in substantially all cases a jury question.

This rather unusual feature of the Indiana law is brought out more clearly by the Supreme Court of Indiana in the other case relied upon by petitioners and based upon Indiana law. In the case of *Heiny v. Pa. R. Co.* (Ind.), 47 N. E. (2d) 145, there was no evidence as to whether or not there had been a compliance with the statute. The railroad attempted to rely upon the doctrine *res ipsa* loquitur, on the theory that if the driver had obeyed the statute there would have been no accident. The court merely followed the ancient doctrine that negligence will not be presumed, as pointed out in the last quoted sentence on page 24 of petitioners' argument. If the italicized language of the court just preceding that sentence is to be taken literally and by itself, then the statute is utterly meaningless. But as the court points out elsewhere in the opinion, in Indiana the burden of pleading and proving contributory negligence is on the defendant. In Iowa the burden is upon the plaintiff to plead and prove absence of contributory negligence. The Indiana court points out that in negligence cases there should be a directed verdict for defendant in no more cases than those in which a verdict should be directed for plaintiff at the close of all of the evidence, which, of course, is practically never. The court said in part at p. 148:

> "It is only when the plaintiff fails to make a case, so that it would be the duty of the trial court, or of a higher court on appeal, to set aside the verdict as not supported by any competent evidence on

some material point, that a verdict for the defendant should be directed."

Petitioners' case involving the Ohio law is in precisely the same category. That was a case involving the doctrine of the last clear chance, which as every lawyer knows presupposes negligence of the plaintiff. The court in a *per curiam* opinion said in part at page 292:

> "He (the engineer) saw the team when 1200 or 1300 feet from the crossing and nothing was done by him further to warn plaintiff of the approach of the train or to abate its speed until it had traveled about half of the intervening distance. * * * We think it was for the jury to determine whether he was guilty of negligence proximately causing the injury after the peril of plaintiff became known or was reasonably apparent to him."

Petitioners next devote several pages of argument in establishing the hornbook principle that in order to constitute contributory negligence there must be some *causal connection* between plaintiff's negligence and the accident. This proposition was fully argued in the court below, was carefully considered by the Court of Appeals, and was discussed in the opinion as follows (R. 170):

> "Hawley, if he had been looking, must have seen the train before he did; and if he had stopped at a point even where the view to the east was only 75 feet, *the collision would not have occurred.*" (Italics ours.)

And again (R. 171):

> "We think the evidence shows without question that if Hawley had stopped and looked and listened * * * where he had a view to the east * * * and where he could have heard the train, *the collision would not have occurred.*" (Italics ours.)

Regardless of all the talk made by petitioners respecting "causal connection" the Iowa law is that in order to defeat recovery by a plaintiff his negligence need not have been a proximate cause of the accident, but conduct merely contributing to the happening of the accident is sufficient. The Iowa cases are exhaustively examined by Judge Graven of the Northern District of Iowa in the case of *Mast v. Illinois Central R. Co.*, 179 Fed. Supp. 149, 159, in which the court said:

> "On the issue of the negligence of the defendant the plaintiff must establish by the greater weight or preponderance of the evidence that the negligence of the defendant was the proximate cause of the injuries complained of. *Burwell v. Sidens,* Iowa 1947, 25 N. W. 2d 864, 865. See, also, *Kemp v. Creston Transfer Co.,* D. C. Iowa 1947, 70 F. Supp. 521, 525, 526. However, in order to defeat recovery, the negligence of the plaintiff need not be the 'proximate' cause of the injuries and it is reversible error so to instruct a jury. *Meggers v. Kinley,* 1936, 221 Iowa 383, 265 N. W. 614; *Hamilton v. Boyd,* 1934, 218 Iowa 885, 256 N. W. 290; *Towberman v. Des Moines City R. Co.,* 1927, 202 Iowa 1299, 211 N. W. 854. Accord. *Anderson v. Holsteen,* Iowa 1947, 26 N. W. 2d 855; *Hellberg v. Lund,* 1933, 217 Iowa 1, 250 N. W. 192. See, also, *Stilson v. Ellis,* 1929, 208 Iowa 1157, 225 N. W. 346, where an instruction using the words 'directly or proximately contributes' was held not to be erroneous. Negligence on the part of the injured person which will defeat recovery *need only be a contributory cause and not a proximate cause. Hogan v. Nesbit,* 1933, 216 Iowa 75, 246 N. W. 270, 272; *Hellberg v. Lund,* 1933, 217 Iowa 1, 250 N. W. 192."

Petitioners next make the startling and amusing assertion that because no Iowan was among the three judges of the Court of Appeals who decided this case,

it follows logically that none of the three is capable of interpreting Iowa law as well as the trial court could determine it. At least the trial court's long experience with Iowa law was of no help with respect to the statute. During the dictation of the motion for directed verdict into the record, when the statute was mentioned Judge Dewey said (R. 71):

> "What section is that? I never heard of that before."

In calling this colloquy to the Court's attention we merely mean to point out the frankness of the trial court in admitting that he knew nothing about the statute. We do not intend in any manner to criticize or disparage Judge Dewey. He is, as the opposing counsel have said, an able and conscientious judge. But we felt at the time and still feel that despite his experience and ability Judge Dewey fell into error in failing to direct a verdict for the defendant in this case. With our view the Court of Appeals concurred.

It is our contention that there is no sufficient ground for review of that decision by this court.

B. The Court of Appeals followed precisely the applicable law of Iowa in accordance with the case of Dean v. C. B. & Q. R. R. Co., 211 Iowa 1347, 229 N. W. 223, and subsequent cases.

Very little is said in Division II of petitioners' argument that is not discussed previously in Division I. Little note need be taken of petitioners' reference to the 7th Amendment to the Constitution except to point out that no reference was made to this amendment during the trial nor before the Court of Appeals. It is mentioned

for the first time here, in a rather shamefaced manner, and properly so. If that amendment were subject to the amazingly strained construction which counsel attempt to place upon it, a jury verdict would in all cases be a finality regardless of the errors which might have been perpetrated in permitting the jury to speculate upon the case. Such is not the law.

Petitioners refer to a number of Iowa cases touching upon contributory negligence in cases of this kind, but before we go into that question we feel it to be our duty, in the interests of accuracy, to point out certain instances wherein counsel's statements in argument are not supported by, or are contrary to, the record.

For an example, counsel say on page 36 of their argument:

> "Even the train crew claimed only that the crossing signal was given at the whistle post 500 feet from the crossing."

Not the train crew, but the fireman, said he saw the truck nose out from behind the freight cars and said further:

> "There was whistling going on before that. I would judge he started to whistle 500 *or 600* feet before we got to the crossing. There is a whistling post there. *He started whistling at the whistling post.*" (R. 84) (Italics ours.)

The fireman then *estimated* the distance at 500 or 600 feet. He was *positive* about the existence of the whistling post, and that the whistling started there. (In conformity to the Iowa statute, whistling posts are 60 rods or 990 feet away from the crossing.)

The engineer, who blew the whistle, testified (R. 82):

> "I whistled for that particular crossing and that was the third time I sounded the whistle from the new track to the point of the accident, in that stretch of a mile."

While it is true that Crites (Arg. p. 49) said he first heard the whistle "possibly 200 ft. east of the crossing," it is also true that his testimony was essentially negative, for he also said (R. 49):

> "I didn't hear no bell. If a bell was rung I didn't hear it. I am not saying there wasn't one. I heard the whistle. *There may have been other whistles I didn't hear.*" (Italics ours.)

Moreover, there was no occasion for Crites to listen for the whistle or bell because he had already seen the train when he crossed the tracks a moment before (R. 48).

> " * * * there is no basis in fact in the record at all for the court's conclusions * * * ."

The record will, and does, speak for itself. It is only because counsel distort or fail to read the record that they make such extravagant and unwarranted statements.

As to whether or not Hawley was looking at all times (Arg. p. 40) it is, of course, true that he testified that he did so, but the physical facts flatly disprove his assertion. The Iowa Supreme Court has frequently held that such testimony will not raise a jury question where the physical facts disclose that if the witness actually had looked he must have seen the train approaching. One such case is *Darden v. Chicago & N. W. R. Co.*, 213 Iowa 583, 586, 239 N. W. 531, 533, where the court said:

> "Where the physical facts are such that, had the plaintiff looked for a train at the distance from the track where she said she did look, she would have seen the approaching train, her failure to see the train shows that she did not look, as she said she did, and she was guilty of contributory negligence as a matter of law. *Artz v. C. R. I. & P. Ry. Co.*, 34 Iowa 153; *Anderson v. Anderson*, 187 Iowa 572."

Again counsel claim on page 45 of their argument that because we limited our appeal to the question of plaintiff's negligence we thereby conceded our own negligence. Truly, this evidences wonderful imagination. The mere fact that we may have chosen to argue only one proposition in order to avoid a burden for the court cannot be stretched into an admission of the worthlessness of other grounds which might have been, but were not, presented. But counsel attempt to build their dream castle higher and higher upon its base of shifting sand by arguing that because we conceded our own negligence, "it would require a *very strong* case of negligence on Hawley's part * * * ." (Italics *theirs*.)

Such sophomoric effusions are nothing more nor less than insults to the intelligence of the members of this Court. Every freshman student of Torts at the College of Law at the University of Iowa knows that *any* negligence of plaintiff which contributes to his injury bars his recovery in Iowa. But even if the rule were in accordance with petitioners' daydreams, it is submitted that here there is a "*very strong* case of negligence on Hawley's part" which not only contributed to the accident but was the proximate cause thereof.

Turning now to page 50 of petitioners' argument, we find the amazing statement that:

> "*Contrary* to what the court says, his testimony was that he (Hawley) saw the train and stopped with *only the bumper of his tractor* across the far rail of track 2." (Italics *theirs.*)

We have already demonstrated in Division I that under Hawley's own testimony his front bumper could not have been less than 10 feet north of the "far rail," which would put Hawley himself at least two feet north of it when he first saw the train.

But perhaps the most startling pronouncement of petitioners' counsel is at page 55 of their argument where they say that the Court of Appeals was "ready to find" Hawley guilty of contributory negligence on the basis of *Dean v. C. B. & Q. R. R. Co.,* 211 Iowa 1347, 229 N. W. 223, "If it had not had the statute * * * to fall back on instead." (This hardly squares with their statement on page 16 that violation of the statute was the "sole reason" for reversal.) But be that as it may, the *Dean* case infra is still the law of Iowa, and even with all their temerity opposing counsel cannot deny it. Their bravest venture is to suggest that it may not still be the law.

The *Dean* case infra is, we submit, as close upon its facts to the case at bar as two negligence cases ever could be.

While it is difficult, if not impossible, to find two crossing accident cases involving exactly similar facts, the case of *Dean vs. C. B. & Q. R. R. Co.,* decided by the Supreme Court of Iowa in 1931 (211 Iowa 1349, 229 N.

W. 223), is so nearly identical in respect to the fact situation involved that the decision of the Iowa Court in that case should be controlling here. Especially is this so since, although the *Dean* case has been cited and discussed in several later decisions of the Iowa Supreme Court, it has never been criticized and is still the law of the state. The following is quoted from the opinion in that case:

> "A primary highway runs along the Chicago, Burlington & Quincy Railroad right of way for some distance west of Murray. On the day in question, and just previous to the accident, the plaintiff was driving west on said highway, intending to cross the railroad track at the private crossing, in order to reach the scene of his farming operations. Upon reaching the wagon road which leads north to defendant's right of way and forms the private crossing in question, the plaintiff turned his car to the north, and followed the wagon road until the front end of his car was about on the south rail of the railroad track, at which time he saw an engine approaching from the west, traveling about 40 or 45 miles per hour. A collision resulted, as the plaintiff did not have time to cross the track or reverse his motor and back the car off the track.
>
> "The track, for several hundred yards west of the crossing, runs through a deep cut, which prevents seeing a train approaching from the west. The vision of a traveler approaching the intersection from the south continues to be obstructed until such traveler reaches a point within a few feet of the track. On the day in question, and for a considerable period of time prior thereto, tall weeds and brush had grown up along the defendant's right of way between the tracks and the side of the cut, so that the traveler's view of the track west was obstructed, on approaching from the south, until he was within

three or four feet of the south rail of the track. The plaintiff was thoroughly familiar with all the conditions which then existed at the private crossing, having used it daily for a considerable period prior to the accident. The private roadway was narrow, and there was a steep grade or ascent leading from the wagon road to the railroad crossing. Plaintiff's contention (supported by the evidence) is that the cut came right up to the roadway on which he was traveling, and that the embankments resulting from the cut were 12 to 15 feet high. Plaintiff also contends that these weeds were so thick that he could not see through them, and that they had been there for a considerable time prior to the accident. In fact, he had noticed them for some time. When he visited his farm, he went over the crossing twice. In brief, *his contention is that the weeds, brush, and embankment absolutely obscured his view until his front wheels were about on the tracks. Plaintiff knew that he was sitting back approximately a distance of seven feet from the front end of his car, and acccording to his contention, the front end of his car would get over the south rail of the south track when he was not less than seven feet back from the rail.* He knew, therefore, that when he was about seven feet back from the south rail, his view would be absolutely obstructed to the west as to a train coming from the west. Plaintiff's eyesight and hearing were good. He testified that, when he first saw the defendant's engine, *it was 40 to 60* feet from him, and traveling *at from 40 to 45 miles per hour.* He claims that he looked for trains from the time he turned north into the private highway until he first saw the train from the west, and that, at the time he first saw the engine, he heard the whistle, but at that time, the front wheels of his automobile were over the south rail of the south track. When the plaintiff turned north off the primary road, he was traveling at a speed of from 8 to 10 miles per hour, which speed was increased slight-

ly. He had been running in high gear, and then shifted to intermediate, in order to make the grade or ascent about 4 feet from the railroad track, and on the approach to the tracks, *was moving at from 3 to 4 miles per hour.* He had traveled over the crossing that day, and concedes that the conditions were the same the first time as at the time of the accident. The plaintiff knew that passenger trains, freight trains, special trains, and single engines passed over the track in question. He testified: 'As a matter of fact, I knew that trains or engines would likely come along in either direction at any time.' He testified that, comparatively speaking, his car was a quiet-running car, though there was no device thereon to eliminate the ordinary noise made in its operation. There was no diverting circumstance. He could have stopped his car, under the conditions, within three or four feet, and so testified. He did not stop. *There is a slight dispute in the evidence as to whether or not the engine made any noise while approaching the crossing, and whether a whistle was sounded or the bell was rung. The engine had an automatic bell, and a considerable part of the testimony as to whistle and bell is negative in character: that is to say, that the witnesses were simply in a position to hear, but did not hear. The day was clear.* There was no wind.

"The primary contention of the appellant is whether or not, under the record evidence, giving plaintiff's evidence the most favorable viewpoint, the plaintiff was guilty of contributory negligence, as a matter of law. This court has repeatedly held that a person approaching a railroad crossing must recognize that it is a zone of danger, and he must be vigilant to discover the approach of trains and use reasonable care to avoid injury therefrom. Stopping or starting an automobile in perfect condition, with good brakes, going at a low rate of speed (which facts are all shown in the instant case), is a simple

movement, requiring very little time or energy. A cursory review of our own decisions is sufficient to find answer to the controlling question under the facts of the case at bar. We cite *Banning v. Chicago, R. I. & P. R. Co.*, 89 Iowa 74; *Payne v. Chicago & N. W. R. Co.*, 108 Iowa 188; *Case v. Chicago G. W. R. Co.*, 147 Iowa 747; *High v. Waterloo, C. F. & N. R. Co.*, 195 Iowa 304. We will not review these decisions in extenso, but a few brief sentences from some of them may be helpful to understand the pertinent and fundamental proposition. In the *Payne* case, supra, it is said that it is the duty of a person, before crossing a railroad track where obstructions block his view, to look and listen before going onto the crossing, and '* * * if, from any cause, he could not know, by looking or listening, while moving forward, whether or not a train was coming, he should have stopped until by looking or listening, he did know that it was safe for him to cross.'

"In the *Case* decision, supra, it is said: 'One about to cross a railway track must take reasonable precautions for his own safety. He must sometimes stop his team and look and listen * * *.'

"In the *High* case, supra, it is said: 'It is always train time at any railroad crossing,' but that 'cases may arise where, under the proven facts, the person injured has so failed to act as a man of ordinary care and prudence that the court must hold, as a matter of law, that he has been guilty of contributory negligence. * * * Under certain circumstances, it may be negligence for him not to stop, in order to listen for a train.'

"It must be conceded that at an obstructed crossing it is the duty of the traveler to exercise a greater degree of care and caution than is incumbent upon him usually, and that there may be such circumstances in a given case that common prudence requires the traveler to stop. It is elementary that, the great-

er the danger, the greater the care and caution necessary for him to exercise to constitute ordinary or reasonable care. Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him. The traveler may have the right, as a general rule, to rely on the fact that a railroad company will perform its duty, either at common law or under the statute, in the operation of its train; but this fact, per se, does not dispense with the care to be exercised by the traveler, and he may be guilty of contributory negligence, under the facts of the particular case to the contrary notwithstanding. Each case must be determined upon its own particular facts. The instant plaintiff knew that he was in a zone of danger. He was acquainted with all of the facts of his environment when he approached the tracks of the defendant railroad company. True, it is the rule ordinarily that the question involved herein must be left to the answer of the fact-finding body. The case of *Hawkins v. Interurban R. Co.*, 184 Iowa 232, is distinguishable on the factual side from the case at bar. The instant case presents the exception to the general rule.

"This private crossing was exceptionally dangerous, because trains approaching it from the west came through a deep cut, which did obscure from view the engine in question, and did deaden somewhat the noise of its approach. The presence of weeds and brush obscured a train from the view of a traveler from the south, and no traveler in an automobile coming from the south to the tracks could see a train approaching from the west until the driver had propelled his automobile almost onto the tracks themselves; and he could then see but 40 to 60 feet to the west of him. The road approaching the track was rough and rutty, and steep enough so that it

required the plaintiff to shift from high gear to intermediate, so that his car could be propelled to and over the tracks. Plaintiff, with absolute knowledge of all these facts, knew that if he looked to the west he could not see an approaching train. Furthermore, we may take judicial notice that a car shifted from high to intermediate gear does create and make additional noise in its operation after the shift is made. This fact would interfere somewhat with plaintiff's hearing the approach of a train. The fact is, however, that he did not stop, and the fact stands that, had he looked to the west all of the time while approaching the tracks, he could not have seen anything until his car was on, or nearly on, the tracks. Plaintiff must have known, under the circumstances, that if he did not stop and a train was approaching which he could not see and could not hear, a collision would be inevitable.

"We hold, therefore, that the plaintiff was guilty of contributory negligence, as a matter of law, and that the trial court erred in overruling defendant's motion for a directed verdict. Reversed." (Emphasis supplied.)

The first Iowa case in which we find the *Dean* case cited is *Nurnburg v. Joyce, et al., Trustees,* 232 Iowa 1244, 7 N. W. 2d 786; the paragraph citing the *Dean* case (232 Iowa at p. 1253) is as follows:

"The evidence shows without contradiction that on November 12, 1939, Roger Nurnburg drove his car from the west onto the crossing where he was struck and fatally injured. Three eyewitnesses say that from a point 150 feet west of the crossing he drove without stopping and did not change his speed. In so doing he must be held to have been guilty of contributory negligence so as to bar recovery herein. See *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 229 N. W. 223; *Darden v. Chicago & N. W. R. Co.,* 213 Iowa 583, 239 N. W. 531."

The *Dean* case is next cited in the case of *Hitchcock v. Iowa Southern Utilities Company of Delaware,* 233 Iowa 301, 6 N. W. 2d 29. That was an appeal by plaintiff from a directed verdict. In the course of its opinion (233 Iowa at 309) the Supreme Court said, citing the *Dean* case:

> "In *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 1351, 229 N. W. 223, 225, we said:
>
> " 'Even the failure of the engineer to ring the bell or sound the whistle, if such be the fact, does not relieve the traveler about to cross a railroad track from the necessity of taking ordinary precaution under the circumstances which confront him.'
>
> "Although appellee did not sound the whistle 960 feet west of the crossing, this negligence did not relieve decedent from exercising due care to avoid injury, from the duty of vigilantly using all of his senses to determine whether there was danger from trains approaching the crossing."

The next case is *Coonley v. Lowden,* 234 Iowa 731, 12 N. W. 2d 870, in which the *Dean* case is cited in a specially concurring opinion. There the court said:

> "This 'stop-to-look-and-listen' rule has not found judicial approval in Iowa except in the case of *Dean v. C. B. & Q. Ry. Co.,* 211 Iowa 1347, where, under the peculiar circumstances and conditions there presented, this court held the plaintiff negligent because he did not stop his vehicle before going upon the track. From an early day, it has been the rule in this state that as trains may rightfully pass at any time, the exercise of ordinary care requires that the traveler shall look and listen, and if, to his knowledge, his view is interfered with so that he cannot see without stopping before driving upon the track, then the jury may impose upon him the duty of stopping

to look before going upon the crossing. Based upon these authorities, we say that the rule in Iowa is that if the view is obstructed, to the knowledge of the traveler on the highway, the jury may say that ordinary care requires him to stop before driving upon the track, for the purpose of making observations."

The foregoing from the specially concurring opinion of Justice J. Mulroney in the *Coonley* case, was quoted by him from the brief and argument of the defendant. Following the quotation Justice Mulroney said this:

"I agree with the foregoing statement of the Iowa law."

Further along in the same case, in a dissenting opinion by Justice Smith, appears the following statement:

"The answer is found in our own decisions, repeated over and over, both in cases where plaintiff prevailed and those in which we held he had not sustained the burden. It is reduced to a succinct and accurate statement by the Corpus Juris text writer:

" 'Where the view or hearing of a traveler approaching a railroad crossing is so obstructed that he cannot otherwise satisfy himself whether it is prudent to cross, it is his duty, where he is familiar with the crossing or aware of such facts, to stop and look or listen before going upon the tracks * * *.' 52 C. J. 309, Section 1844, citing *Dean v. Chicago, B. & Q. R. Co.*, 211 Iowa 1347, 229 N. W. 223; *High v. Waterloo, C. F. & N. Ry. Co.*, 195 Iowa 304, 190 N. W. 331; *Wilson v. Illinois Cent. Ry. Co.*, 150 Iowa 33, 129 N. W. 340, 34 L. R. A., N. S. 687; *Moore v. Chicago, St. P. & K. C. Ry. Co.*, 102 Iowa 595, 71 N. W. 569; *Nosler v. Chicago, B. & Q. Ry. Co.*, 73 Iowa 268, 34 N. W. 850; besides many decisions from other states.' "

The next and last case we have been able to find citing the *Dean* case is *Scherer v. Scandrett,* 235 Iowa 229, 16 N. W. 2d 329, which affirmed the judgment upon directed verdict against the plaintiff in crossing accident litigation. In the opinion in that case the court said:

> "Numerous later cases support the rule that in absence of diverting circumstances or deceptive appearances, a motorist approaching a crossing, who knows his view is obstructed until he is close to the track, must, in the exercise of due care, not only look when he reaches the point where looking is possible but must then have his own vehicle under such reasonable control as to enable him to stop if necessary to avoid collision. See *Hitchcock v. Iowa Southern Utilities Co.,* 233 Iowa 301, 6 N. W. 2d 29; *Nurnburg v. Joyce,* 232 Iowa 1244, 7 N. W. 2d 786; *Carlin v. Thompson,* 234 Iowa 469, 12 N. W. 2d 224; *Dean v. Chicago, B. & Q. R. Co.,* 211 Iowa 1347, 229 N. W. 223."

In the same case which was a five to four decision of the Iowa Supreme Court, the four dissenting judges, speaking through Bliss, J. said at page 261 of 235 Iowa:

> "In what particular or in general did this young man's conduct greatly differ from that of the thousands of motorists who travel over roads unfamiliar to them? *He was not looking at a place where he could not see at all as in the Dean case.* Dean v. C. B. & Q. R. Co., 211 Iowa 1347, 229 N. W. 223."

Thus it appears that the entire court recognized the *Dean* case as being the law of Iowa in circumstances such as exist in the case at bar.

We think it must be said that where the motorist's view is wholly obstructed, as Hawley claims his view was obstructed, and as Dean claimed his view was obstructed,

the law of Iowa requires such motorist to stop before going onto the track and his failure to do so is negligence as a matter of law.

A rather recent case is *Nurnburg v. Joyce,* 232 Iowa 1244, 7 N. W. 2d 786. The following quotations from the opinion will be sufficient to set forth the facts and issues involved in that case:

> "The court submitted but two of such grounds to the jury: First, the claim of the appellee that the appellant was negligent in the operation of the train, in failing to give proper signals on approaching the crossing by the ringing of the bell; and, second, appellant was neligent in that the train was traveling at the time of the collision at an excessive rate of speed at the crossing in question.
>
> "The appellant urges that the court was in error in failing to sustain the motions for a directed verdict and by overruling the same and submitting the case to the jury.
>
> "The main argument of the appellant is devoted to its claims that the appellee failed to prove that the decedent, Roger Nurnburg, was free from negligence which contributed to his injuries and death.
>
> * * *
>
> "In order to sustain the verdict herein it is necessary that the appellee show that Roger Nurnburg, decedent, was free from contributory negligence at and just prior to the time of the collision; also, that at the same time appellant was negligent, which said negligence directly and proximately resulted in the injury to Roger Nurnburg.
>
> "Appellant contends that under the record the evidence shows that Roger Nurnburg was guilty of contributory negligence as a matter of law, and such

being the case, the court was in error in failing to direct a verdict as moved for by such appellant. * * *

"Mansell Nurnburg, administrator of the Roger Nurnburg estate, and a son of deceased, aged 24, who lived with his father, stated that he traveled over this road and crossing frequently. As a witness he was asked on direct examination the following:

"'Q. Just tell the jury how close you would have to be up there to that railroad crossing where your father was killed before you would see a train coming from the north? A. He would have to be right up onto the crossing because the view is obstructed by a tree. And it is obstructed by telephone poles and those weeds and sprouts and bushes grown up there.'"

In analyzing the evidence in this case the Supreme Court of Iowa observed:

"If the view to the north from the crossing was obstructed, then there devolved upon Roger Nurnburg the duty to exercise the care and caution commensurate with the apparent danger. The physical facts show that for the 150 feet from the Cheers corner to the crossing the train could have been seen to the north at least 750 feet, or one-eighth of a mile. Assuming that the train was traveling 45 miles per hour, it would require something like 13 seconds to reach the crossing if it maintained its speed. If Roger Nurnburg was traveling 15 miles per hour and did not change his speed he would reach the crossing in about 7 seconds.

"We are of the opinion that the evidence shows that said Roger Nurnburg was guilty of contributory negligence as a matter of law, and such being the case, there can be no recovery under this record."

It is respectfully submitted that if these cases were to be determined by the Supreme Court of Iowa even

without the statute involved here the decision would be controlled by the *Dean* case. Under familiar principles it is just as controlling upon the decision of this Honorable Court. But the case at bar presents an even more aggravated case of contributory negligence than did the *Dean* case and the Iowa cases which followed it. This is because of the undisputed fact that the truck in question was loaded with 6300 gallons of gasoline (R. 20). Thus the danger inherent in the operation of the truck was far greater than would be true in operating an ordinary motor vehicle. It is elementary law that he who is in charge of a dangerous instrumentality must exercise a degree of care commensurate with the danger involved. Thus a driver of a vehicle heavily loaded with highly explosive and inflammable materials must, in the exercise of ordinary care, be held to a higher degree of care than would be the case if he were carrying a nonexplosive or noninflammable load. It was this principle that led the Iowa legislature to enact the statute involved in this case.

VII.

CONCLUSION

Whether this case be considered under the mandate of the statute, or under the doctrine expressed in the *Dean* and later cases, or under a combination of both, it is the law of Iowa that where such flagrant violation of the laws and rules of care for self-preservation and for the safety of others appears as in the case at bar, the plaintiffs cannot recover because they are negligent as a matter of

law. This is the law of Iowa. This was the decision of the Court of Appeals. Certiorari should be denied.

Respectfully submitted,

JOHN HALE,

J. C. PRYOR,

408-416 Tama Building,
Burlington, Iowa,

Attorneys for Respondent.

ELDON MARTIN,

547 West Jackson Blvd.,
Chicago 6, Illinois,

Of Counsel.